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U.S. Department of Homeland Security

Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536*

File: WAC 02 092 50574 Office: CALIFORNIA SERVICE CENTER

Date: APR 21 2004


IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a horse ranch. It seeks to employ the beneficiary permanently in the United States as a barn boss. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on January 6, 1998. The proffered wage as stated on the Form ETA 750 is \$14.54 per hour, which equals \$30,342.20 per year.

With the petition counsel submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on July 26, 2002, the California Service Center requested evidence pertinent to that ability. Specifically, the Service Center requested, pursuant to 8 C.F.R. § 204.5(g)(2), that the petitioner demonstrate its continuing ability to pay the proffered wage with copies of annual reports, federal tax returns, or audited financial statements.

In response, counsel submitted the petitioner's 1998, 1999, and 2000 Form 1120 U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a loss of \$1,720,656 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$472,488 and current liabilities of \$93, which yields net current assets of \$472,395.

The 1999 return shows that the petitioner declared a loss of \$1,691,372 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$147,611 and current liabilities of \$803, which yields net current assets of \$146,808.

The 2000 return shows that the petitioner declared a loss of \$2,628,717 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2001 return shows that the petitioner declared a loss of \$2,306,996 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$108,584 and current liabilities of \$413, which yields net current assets of \$108,171.

With those returns, counsel submitted a letter, dated October 16, 2002, from Lexington Commercial Holdings, Incorporated. The letter states that although the petitioner operates at a loss, "the shareholder personally guarantees the operations of the farm, and makes capital contributions to [the petitioner] as needed." The letter further notes that the petitioner has substantial assets. The letter does not state the relationship between Lexington Commercial Holdings and the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and denied the petition on November 21, 2002.

On appeal, counsel submits a letter, dated January 2, 2003, from the petitioner's owner. In that letter, the petitioner's owner states that he and his wife are the petitioner's sole owners and that they agree to provide funds to the petitioner as necessary. Counsel provides evidence pertinent to the wealth of the petitioner's owner.

Counsel asserts that the evidence submitted demonstrates that the petitioner's owner is able to pay the proffered wage. Counsel provides a letter from the petitioner's owner in which he freely promised to "provide the funds necessary" to the petitioner from his own resources.

Counsel provided no evidence, however, that the petitioner's owner may not just as freely retract that promise. The petitioner's owner is clearly able to pay the proffered wage. He appears to be equally able to decline to pay it.

General partners and owners of sole proprietorships are obliged to pay the debts and obligations of their companies. Their income and assets are, therefore, properly included in the computation of the petitioning company's ability to pay the proffered wage.

A corporation is a legal entity separate and distinct from its owners or stockholders. The debts and obligations of the corporation are not the debts and obligations of the owners or stockholders. As the owners or stockholders are not obliged to pay those debts, the income and assets of the owners or stockholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980).

As the petitioner's owners are not obliged to pay the petitioner's debts and obligations, the income and assets of the petitioner's owners and their ability to pay the corporation's debts and obligations if they wished, is irrelevant to this matter and shall not be further considered.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date is January 6, 1998. The proffered wage is \$14.54 per hour, which equals \$30,342.20 per year.

The petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during 1998, but only that portion which would have been due if it had hired the petitioner on the priority date. On the priority date, five days of that 365-day year had elapsed. The petitioner is obliged to demonstrate the ability to pay the proffered wage during the remaining 360 days. The proffered wage multiplied by 360/365th equals \$29,926.55, which is the amount the petitioner must show the ability to pay during 1998.

During 1998 the petitioner declared a loss of \$1,720,656, but had year-end net current assets of \$472,395. The petitioner has demonstrated the ability to pay the proffered wage during 1998 out of its assets.

During 1999 and ensuing years, the petitioner is obliged to show the ability to pay the entire proffered wage. During 1999 the petitioner declared a loss of \$1,691,372, but had year end net current assets of \$146,808. The petitioner has demonstrated the ability to pay the proffered wage during 1999 out of its net current assets.

During 2000 the petitioner declared a loss of \$2,628,717 and ended the year with negative net current assets. The petitioner did not demonstrate that any other funds were available during that year to pay the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner declared a loss of \$2,306,996, but had year end net current assets of \$108,171. The petitioner has demonstrated the ability to pay the proffered wage during 2002 out of its net current assets.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000. Therefore, the petitioner has not established that it had the ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.